

CONFIDENTIAL BUSINESS INFORMATION

Redacted

From: mara.lewis@ffic.com [<mailto:mara.lewis@ffic.com>]
Sent: Wednesday, October 26, 2011 12:20 PM
To: Miller, Jeff
Subject: Kaiser Gypsum Company / Lower Duwamish Waterway / 10510147759

Please find the attached correspondence.



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Mara L. Lewis | Claim Specialist | Allianz of America Resolution Services | **Fireman's Fund Insurance Company**
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On behalf of the following Fireman's Fund Insurance Company(ies):
Fireman's Fund Insurance Company


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We started with a promise. We have a promise to keep.

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October 25, 2011

VIA EMAIL AND CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Steven F. Hill, P.C.
Miller Nash
500 East Broadway
Suite 400
Vancouver, Washington 98660-3324

Re: **Insured:** Kaiser Gypsum Company, Inc.
Insurer: Fireman's Fund Insurance Co.
Policy No(s): XLX1269069 (12/07/1979-04/01/1981)
XLX1372713 (04/01/1981-04/01/1983)
XLX1482790 (04/01/1983-05/01/1984)
Claim: Lower Duwamish Waterway Superfund Site
Claim No.: 10510147759

Dear Mr. Hill:

As an initial matter, this correspondence serves to acknowledge Fireman's Fund Insurance Company's ("Fireman's Fund") receipt of your December 21, 2010 letter, on behalf of Kaiser Gypsum Company, Inc. ("KGC") placing Fireman's Fund on notice of the investigation that apparently is being undertaken by the U.S. Environmental Protection Agency ("EPA") and the EPA's February 19, 2010 request for information, which was served on KGC, relating to the Lower Duwamish Waterway Superfund site ("LDW"). It is our understanding that, presently, the EPA is investigating KGC's past ownership interest and operations on certain property located on the LDW, but that no "claim" or "suit" for any environmental impairment, damages, monetary losses or other costs or expenses, within the meaning of the excess policies issued by Fireman's Fund to KGC (as described below), has been initiated or threatened by the EPA against KGC. If you believe this understanding or any of the information in this letter is incorrect or incomplete, please let me know.

Fireman's Fund
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www.firemansfund.com

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According to your December 21, 2010 letter, KGC has confirmed:

- KGC owned and operated a gypsum plant at 5931 East Marginal Way South, Seattle, WA, on the eastern side of the Lower Duwamish Waterway (the "KGC Property") from 1952 to 1978.

Based on this recitation of KGC's past ownership interest, a few questions appear to remain unanswered. Please describe the type of operations that occurred at this plant in more detail, as well as a description of any potentially hazardous products, chemicals or other substances that were used, consumed or stored on-site. Second, please confirm whether all operations at the plant ceased in 1978, or whether there was a change in ownership. If there was a change in ownership, who took over ownership of that plant and/or property from KGC. You also state that KGC has provided a preliminary response to the EPA's request for information. Please provide a copy of that preliminary response, as well as any and all correspondence KGC has had with the EPA to date. We have received a copy of Kaiser Cement Corporation's ("KCC") response, but not that of KGC.

That said, this correspondence will communicate Fireman's Fund's current, preliminary coverage position regarding this matter, subject to the limited and incomplete information currently provided by KGC and with a full reservation of Fireman's Fund's rights under the terms and conditions of any and all Fireman's Fund policies, other written agreements between the parties as applicable, if any, and applicable law, and will explain why policies XLX1269609, XLX1372713, and XLX1482790 (hereinafter collectively referred to as "the Excess Policies") are not applicable at this time to the EPA's request for information. If the EPA submits additional requests of any kind or takes any action of any kind against KGC, please let us know so that Fireman's Fund may evaluate those future new developments.

Fireman's Fund issued the following Blanket Excess Liability Policies (Following Form) (5902-2/72) to KCC, naming any of its subsidiaries, which would necessarily include KGC, as additional insureds:

Policy Number	Policy Period	Limits of Liability / Attachment Point
XLX1269609	12/07/1979-04/01/1981	\$25 million each occ/agg excess of \$75 million each occ/agg
XLX1372713	04/01/1981-04/01/1983	\$30 million part of \$50 million excess over \$100 million
XLX1482790	04/01/1983-05/01/1984	\$29 million (58%) part of \$50 million excess over \$100 million

Based on the information provided to date, it is our understanding that KGC is seeking coverage from Fireman's Fund relating to the EPA's investigation and request for information relating to the LDW under the policies outlined in the chart above. If you believe there are other policies

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that were issued by Fireman's Fund that may provide coverage for these matters, please identify and provide copies of such policies at your earliest convenience.

**FIREMAN'S FUND'S EXCESS POLICIES ISSUED TO KGC AS AN ADDITIONAL
INSURED**

The Excess Policies contain the following provisions, without limitation to other terms and conditions, which may be relevant.

The insuring agreements provide:

Insuring Agreements

1. **Coverage.** To indemnify the Insured for the Insured's ultimate net loss in excess of the insurance afforded under the Blanket Excess Liability or "Umbrella" policies specified in Item 7 of the Declarations, hereafter called underlying insurance, in full force and effect at the inception of this policy, provided that the insurance for injury to or destruction of property under this policy and underlying policies shall not apply except as respects injury to or destruction of corporeal property, including loss of use thereof.

2. **Limit of Liability.**¹ The Company shall be liable only for the limit of liability stated in Item 3 of the Declarations in excess of the limit of limits of liability of the

¹ The Limit of Liability provision of policy XLX 1372713 was amended to state:

2. **Limit of Liability.** The Company shall be liable only for the limit of liability stated in Item 3 of the Declarations in excess of the limit of limits of liability of the applicable underlying insurance policy or policies all as stated in the declarations of this policy. The limit of liability stated in the declarations as applicable to "each occurrence" shall be the total limit of the Company's liability for all damages sustained as the result of any one occurrence, provided, however, in the event of the reduction or exhaustion of the applicable aggregate limit or limits of liability under said underlying policy or policies solely by reason of losses paid thereunder on account of occurrences during this policy period, this policy shall in the event of reduction, apply as excess of the reduced limit of liability thereunder. Subject to the applicable limit of liability as respects each occurrence, the limit of liability stated in the declarations as "aggregate" shall be the total limit of the Company's liability for all damages sustained during each annual period of the policy because of (i) personal injury and property damage arising out of the completed operations hazard and products hazard, combined; or (ii) advertising whenever occurring by whatever media, on account of all occurrences; or (iii) injury arising out of any hazard, other than as described in (i) and (ii), to which the underlying policy affords coverage subject to an aggregate limit and to which this policy also applies.

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applicable underlying insurance policy or policies all as stated in the declarations of this policy. The limit of liability stated in the declarations as applicable to "each occurrence" shall be the total limit of the Company's liability for all damages sustained as the result of any one occurrence, provided, however, in the event of the reduction or exhaustion of any applicable aggregate limit or limits of liability under said underlying policy or policies solely by reason of losses paid thereunder on account of occurrences during this policy period, this policy shall in the event of reduction, apply as excess of the reduced limit of liability thereunder. Subject to the applicable limit of liability as respects each occurrence, the limit of liability stated in the declarations as "aggregate" shall be the total limit of the Company's liability for all damages sustained during each annual period of the policy.

"Ultimate net loss" is defined in the Excess Policies as follows:

"Ultimate net loss" means all sums actually paid, or which the Insured is legally obligated to pay, as damages in settlement or satisfaction of claims or suits for which insurance is afforded by this policy, after proper deduction of all recoveries or salvage.

The Excess Policies also contain the following conditions, among other relevant terms and conditions:

1. **Maintenance of Primary Insurance.** The Insured warrants, and it is a condition of this policy, that at the inception of this policy, insurance afforded by the underlying policies of insurance (applying as excess over various policies of primary insurance) with combined limits of liability for said underlying insurance stated in Item 4 of the declarations, or renewals or replacements thereof not affording coverages other than those at inception of this policy, shall be maintained in full effect during the period of this policy, except for reduction of aggregate limits solely as a result of payment of claims arising out of occurrence during this policy period. If such underlying insurance is not maintained in full effect by the Insured or if there is any change in the scope of coverage under any underlying insurance, the insurance afforded by this policy shall apply in the same manner as though such underlying policies had been so maintained and unchanged.

The insurance afforded by this policy is subject to the same warranties, terms (including the terms used to describe the application of the limits of liability), conditions and exclusions as are contained in the underlying insurance on the effective date of this policy, except, unless otherwise specifically provided in this policy, any such warranties, terms, conditions or exclusions relating to premium, the obligation to investigate and defend, the amount and limits of liability, and any renewal agreement.

2. **Notice of Occurrence.** The Insured shall immediately advise the Company of any occurrence or disaster which will probably result in liability under this policy. The Company shall not, however, be called upon to assume charge of the settlement or

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defense of any claims made, or suits brought, or proceedings instituted against the Insured, but shall have the right and opportunity to be associated with the Insured in the defense and trial of any such claims, suits or proceedings relative to any occurrence which, in the opinion of the Company, may create liability on the part of the Company under the terms of the policy. If the Company avails itself of such right and opportunity, the Insured and the Company shall cooperate in all respects so as to effect a final determination of the claim or claims.

3. Payment of Loss. It is a condition of this policy that the insurance afforded under this policy shall apply only after all underlying insurance has been exhausted. Upon final determination by settlement, award or verdict of the liability of the Insured, the Company shall promptly pay the Insured as the Insured shall pay, or be required to pay the amounts of any losses falling within the terms or limits of this insurance. All losses covered under this policy shall be due and payable by the Company within 30 days after they are respectively claimed and proof of loss filed with the Company in conformity with this policy. Bankruptcy or insolvency of the Insured shall not relieve the Company of any of its obligations hereunder.

4. Payment of Expenses. Loss expenses and legal expenses, including court costs and interest, if any, which may be incurred by the Insured with the consent of the Company in the adjustment or defense of claims, suits or proceedings shall be borne by the Company and the Insured in the proportion that each party's share of loss bears to the total amount of said loss. Loss expense hereunder shall not include salaries and expense of the Insured's employees incurred in investigation, adjustment and litigation.

* * * * *

Pursuant to the Maintenance of Primary Insurance condition, the Excess Policies are subject to the same warranties, terms, conditions and exclusions as contained in the underlying insurance on the effective date of the respective Excess Policies, except, unless otherwise provided in this policy, any such warranties, terms, conditions or exclusions relating to premium, the obligation to investigate and defend, the amount and limits of liability, and any renewal agreement.

Please be advised that Fireman's Fund has no duty to defend KGC in this matter based on the no duty "to assume charge of the defense" provision contained in the Notice of Occurrence [sic] condition in the Excess Policies. In addition, Fireman's Fund has no obligation to pay or reimburse KGC's defense costs in this matter due to the fact that the definition of "ultimate net loss" contained in the Excess Policies does not include defense expenses and the Payment of Expenses condition in the Excess Policies makes clear that Fireman's Fund has no obligation to pay for expenses unless Fireman's Fund consents to pay for them. However, Fireman's Fund has the right to associate with KGC in the defense of any claim, suit or proceeding, if Fireman's Fund elects to exercise such right. Please be advised that Fireman's Fund's consent to incur

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defense costs that would be reimbursed by Fireman's Fund must be expressly sought by KGC and explicitly provided by Fireman's Fund. Consent will not be inferred or presumed under any circumstances.

Furthermore, pursuant to the Insuring Agreements, the definition of "ultimate net loss," and the Payment of Loss condition, KGC is not entitled to indemnification in connection with the above-referenced matter under the Excess Policies, if at all, until the limits of all applicable underlying insurance have been properly exhausted. Absent a showing of such exhaustion of all applicable underlying insurance, Fireman's Fund has no current obligation to indemnify KGC under the Excess Policies for any losses associated with the above-referenced matter.

Although Fireman's Fund has no current obligation to indemnify KGC under the Excess Policies for the above-referenced matter, there are other issues and policy provisions that are either contained in the Excess Policies or in the underlying insurance which would potentially limit or preclude coverage. Accordingly, in the event the underlying insurance becomes properly exhausted by payment of covered claims, Fireman's Fund reserves the right to assert the following coverage defenses:

- 1) In accordance with policy provisions, coverage under the Excess Policies may be precluded for any cost alleged to have been or to be incurred in connection with any claim for equitable relief or injunctive relief;
- 2) In accordance with policy provisions and/or public policy, there may be no coverage under the Excess Policies for punitive damages, fines, or penalties alleged or recovered in this matter;
- 3) Coverage under the Excess Policies is not available if the alleged damages were not the result of an occurrence;
- 4) Coverage may be barred to the extent KGC did not provide timely notice of any occurrence, claim, or suit;
- 5) Coverage does not apply to amounts sought or recovered in the captioned matter that do not constitute damages;
- 6) Coverage under the Excess Policies is not available if the property damage did not occur during the policy period;
- 7) Coverage is not available for any damages that do not constitute property damage;
- 8) In accordance with the Policy Period provision, the Excess Policies only apply to occurrences which take place during the policy period;

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- 9) In no event is KGC entitled to coverage in excess of the limits of liability as stated in the Excess Policies;
- 10) Fireman's Fund reserves the right to deny coverage if KGC is not a named insured or does not qualify as an insured under the Excess Policies;
- 11) Fireman's Fund reserves the right to disclaim coverage under the Excess Policies for damages falling within the terms of any applicable pollution exclusion;
- 12) Fireman's Fund reserves the right to limit or preclude coverage to the extent that KGC knew and/or should have known of the property damage at issue prior to the inception of the Excess Policies;
- 13) Fireman's Fund reserves the right to disclaim coverage for any property damage that falls within any applicable owned property exclusion or similar exclusion;
- 14) Coverage does not apply to property damage that is expected or intended;
- 15) Fireman's Fund reserves the right to disclaim coverage under the Excess Policies for property damage to any premises that were alienated by KGC;
- 16) Coverage may be barred, in whole or in part, to the extent that KGC, by its actions and/or inactions, failed to mitigate, minimize, or avoid damages, or has prejudiced the rights of Fireman's Fund under the Excess Policies; and
- 17) Coverage for this claim may be limited by application of the "Other Insurance" provision;
- 18) Coverage may be barred under the Excess Policies if this claim does not qualify as a "suit";
- 19) The Excess Policies may not provide coverage for any fees, expenses, damages or any costs that were incurred by KGC prior to the date that this matter was tendered to Fireman's Fund; and
- 20) The Excess Policies may not provide coverage for any payments or expenses that were voluntarily incurred and/or assumed by KGC in this matter.

In summary, Fireman's Fund has no duty to defend and no obligation to reimburse defense costs under the Excess Policies. Additionally, Fireman's Fund has no current obligation to indemnify KGC under the Excess Policies for any losses, since the underlying insurance has not yet been properly exhausted by payment of covered claims.

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To the extent that KGC has information regarding the application of underlying insurance, or the erosion and/or exhaustion of the limits of underlying insurance, please provide such information to the undersigned at your earliest opportunity. Specifically, Fireman's Fund requests that KGC provide us with a list of its other insurers and their respective policy numbers, effective dates, limits of liability and contact information. Fireman's Fund requests that you place KGC's other insurers on notice of this claim if you have not done so already. Additionally, please advise Fireman's Fund of the nature of the other insurers' responses.

Fireman's Fund will continue to monitor this matter, subject to the aforementioned reservation of rights under the Excess Policies. Accordingly, please keep us apprised of any developments.

This letter is based upon information Fireman's Fund has received to date, and is not intended, nor shall it be construed as, an exhaustive listing of all the policy terms, conditions or exclusions, which may apply to this matter. Fireman's Fund does not waive any other rights or defenses to coverage that may be applicable, whether or not such rights or defenses are specifically set forth in this letter. Fireman's Fund specifically reserves the right to amend or supplement this letter based upon later-acquired information or for any other reason. All of Fireman's Fund's rights in connection with this matter are expressly reserved, whether asserted herein or not.

If KGC believes any aspect of this claim has been overlooked, or has any additional information that it would like us to consider, please feel free to notify me of your concerns and/or forward any additional information to my attention. We will be glad to consider any further information KGC submits.

If you believe that this claim has been wrongfully denied or rejected, you may have this matter reviewed by the California Department of Insurance at the following address:

California Department of Insurance
Consumer Services Division
300 S. Spring Street, South Tower
Los Angeles, CA 90013
800-927-4357 or 213-897-8921

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Please direct all future correspondence on this matter to my attention via email at mara.lewis@ffic.com or directly at (608) 497-0515. Please note we are striving for a paperless office and prefer electronic communications.

Respectfully submitted,

Mara Lewis (ea)

Mara Lewis
Claims Specialist
Fireman's Fund Insurance Company

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